

no injury; has no claim to the property mentioned in the deed of trust; and submits to such decree as may be deemed just. To these answers a general replication having been filed, a commission was issued, which having been returned without collecting any proofs, the case was submitted on the notes of the solicitor for the plaintiff, and on the notes of the solicitor for the defendant Harwood. Upon which, on the 2d of May, 1825, a decree was passed, that unless the defendant Harwood paid the mortgage debt and costs on or before the 2d of June, then next, the property should be sold. It does not appear, that the mortgage debt has been paid, or that any sale has been made under the decree.

On the 25th of August last the defendant Mullikin filed his petition, on oath, in which he sets forth particularly the course he had pursued, and how far he was uninformed; and concludes by averring, in general terms, that he acted throughout in ignorance of his legal rights and duties; in ignorance of the facts; and was misled and deceived by his co-defendant Harwood; by the gross neglect of the specified creditors to notify him of their claims; and by the omission of the plaintiff's solicitor, Nicholas Brewer, to inform him of the answer of the defendant Harwood, and the matters therein stated. Upon which the petitioner asked  
 \*leave to file a bill of review, or to have granted to him **506**  
 such other relief as the nature of the case might require.

It has been urged, that the petition, having been sworn to, is of itself sufficient ground for granting leave to file a bill of review; that it was entirely unnecessary to have taken any testimony in support of the allegations of the petition; and therefore, that it would be needless to decide upon the objections made to the competency of the witnesses who have been examined.

I have met with no instance in the English books, in which it appears, that any testimony had been taken and read at the hearing of an application for leave to file a bill of review grounded on an alleged discovery of new matter unknown before the decree. It is clear that the party himself, as well as his solicitor, if the solicitor be alive, and there is any reason, from the circumstances of the case, to believe that he might have known of the alleged new matter, must each of them make a particular, full, and distinct affidavit, that he did not, before the decree, know of that which is stated as the newly discovered matter. 1 *Harr. Pra. Chan.* 179. But, it is said to be necessary to state in such bill of review, that leave was obtained to file it, and the fact of the discovery; though it may be doubted, whether after leave given to file the bill, that fact is traversable; or whether, if it should not be admitted it must be proved at the hearing of the bill of review. *Mitf. Plea.* 89. Hence it would seem, that the grounds upon which the leave is granted should, at one stage or other, be allowed to be traversed, and be required to be sustained by proof. If so,